

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1147

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-1147

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

- against -

RICHARD RIZZO, NICHOLAS BOTTA,
LAWRENCE MESSINA, JOHN YARMOSH,
JOHN IANNONE, IRVING ALBAHARI,
JOSEPH FALCO, DAVID STEINBERG,

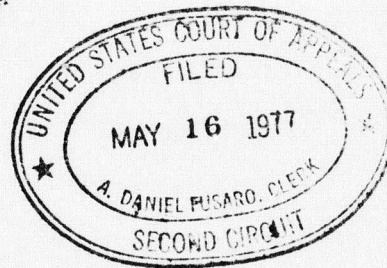
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT
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BRIEF FOR DEFENDANT-APPELLANT JOSEPH FALCO

PRELIMINARY STATEMENT

Joseph Falco appeals from a judgment of the United States District Court for the Southern District of New York, Edward Weinfeld, judge, convicting him and three co-defendants - John Iannone, Irving Albahari, and David Steinberg - after a jury verdict of conducting an illegal gambling business in violation of 18 U.S.C. § 1955 and of conspiring to conduct an illegal gambling business in violation of 18 U.S.C. § 371.

Before trial, an evidentiary hearing was held before Judge Weinfeld to resolve a motion to suppress wiretap evidence. Judge Weinfeld denied the motion.*

*Guilty pleas were then entered by seven defendants including appellants Richard Rizzo, Nicholas Botta, Lawrence Messina, and John Yarmosh, all of whom preserved their right to appeal on the Fourth Amendment question. This appellant wishes to adopt the arguments of the co-appellants in their briefs in regard to the suppression issues.

On March 14, 1977, the appellant was sentenced to a jail term of nine months on each guilty count to run concurrently with each other and was released on his own recognizance pending resolution of his appeal.

FACTS

INTRODUCTION

The indictment charged eleven individuals with conducting an illegal gambling business between October 1974 and November 1975. The convictions rest on the testimony of two unindicted conspirators who were positioned at the core of a large-scale sports gambling operation known as "Dixon," and on FBI visual surveillance of certain defendants in the vicinity of "Dixon" headquarters in East Harlem, and in regard to the guilt of Joseph Falco ("Falco"), primarily on wiretap evidence - six telephone calls that uncovered "National," a sports gambling entity of which Falco was a member and for whom Falco accepted "lay off" bets from "Dixon" on June 14 and 15, 1975, two days in the life of "Dixon."

Viewing the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Falcone*, 544 F2d 607, 610 (2nd Cir. 1976), Cert. Denied, U.S., 45 U.S.L.W. 3600 (March 7, 1977), a reasonable juror could

fairly find that Richard Esposito, a co-defendant who pleaded guilty, bossed "Dixon" and operated it as an "illegal gambling business" within 18 U.S.C. § 1955 in that he had five or more workers - of those on trial, David Steinberg, a wireroom "clerk"* and the "runners"** John Iannone, "Kodak," and Irving Albahari, "AC," - and gross revenue of more than \$2,000 on a single day - according to Daniel Kramer, a conspirator who testified, there was daily betting volume of \$25,000 to \$75,000.

[Tr. 299]

SINGLE OR MULTIPLE CONSPIRACY

The government maintained in its indictment and proved at trial that three independent sports gambling operations, "Mr. White," "Commander I," and "National" accepted "lay off"*** bets from "Dixon."

*Bettors transmit their wagers by telephone to an operation's wire-room where "clerks" receive and record the bet.

**A person who wishes to make a bet finds himself a "runner" and is added to the runner's "sheet." The runner gives his new bettor the wireroom's telephone number and a code name. The bettor then calls the wireroom, identifies himself and his runner and places a bet. The runner has the weekly responsibility of paying his sheet's winning wagers and collecting the bettors' losing wagers. The runner usually keeps 50 percent of his sheet's winnings, the balance goes to the organization.

***The Eighth Circuit in *United States v. Thomas*, 508 F2d 1200, 1202 N2 (8th Cir. 1975), Cert. Denied 421 U.S. 947 (1975) defined "lay off" bets thus:

Ideally a bookmaker has an equal amount wagered on both sides of each event with the result that he has a ten percent profit, less expenses, and ideally, loses nothing. In truth, betting is rarely equal on both sides and bookmakers may lose money,

By dint of their having accepted these lay off wagers, the government successfully contended below that "Mr. White," "Commander I," and "National" had unified into a single conspiracy with "Dixon" at the hub. At trial, however, the government made no demonstration that "National," membered by Falco, dealt with "Mr. White" or "Commander I," or knew of their existence, or even had reason to.

Rather than a single conspiracy, Falco contends here that there were three, each between "Dixon" and each of the bookmaking organizations it gave lay off wagers to, and that under the cloak of a single conspiracy non probative criminal evidence was marshaled against him to his prejudice. As will be detailed hereafter, the government made Falco appear to be an enormous menace when actually the government proved him a tiny cog belonging to an organization too small to handle "Dixon's" lay off activity.

even to the point of their business being destroyed.

To protect against losses, a bookmaker normally engages in "lay off" betting whereby he passes on to another bookmaker the amount of bets by which his own "book" is unbalanced; thus to the extent he loses to his own customers, he wins back from the other bookmaker, or vice versa. The "lay off" bet is therefore, in effect, bookmaker's insurance.

SUFFICIENCY OF THE EVIDENCE AGAINST FALCO

Counsel for Falco argued to the jury that the evidence against his client was insufficient to bring him within the purview of the gambling statute; that assuming he had received "Dixon" lay off bets, he was not involved in the "conduct" of "Dixon's" business.
[Tr. 522]

Judge Weinfeld in his charge to the jury adopted an intermediate position that would bring Falco within the statute's purview if he was found to have:

"... provided a regular and consistent market for lay off bets by the "Dixon" operation ... and that such lay offs were reasonably necessary to permit the "Dixon" operation to function as an illegal gambling operation ..."

[Tr. 575]

In this posture, a summary of the evidence pertaining to Falco would include: three taped telephone conversations, one on June 14, 1975, and two on June 15, 1975, between Joseph Falco and Richard Rizzo, a "Dixon" wireroom clerk, establishing that on these two days Falco on behalf of "National" accepted "Dixon" lay off bets; two taped telephone conversations on June 13, 1975, between an unidentified member of "National" and Richard Rizzo in which "National" requests a meeting with "Dixon" and then one is confirmed

for the following day; FBI agent Richard Nalley's observation of a meeting between Falco and Richard Esposito, the boss of "Dixon," on June 14, 1975 [Tr. 198]; after the June 14, 1975 meeting a taped telephone conversation between Richard Rizzo and Daniel Kramer, a clerk with "Dixon" at the time but later on an independent mover of "Dixon" lay off wagers to "Mr. White," in which Rizzo tells how "National" had disclosed at the meeting that it was too small to handle "Dixon's" lay off wagers and would have to give it back; testimony of Robert Briendel a partner with Richard Esposito in "Dixon" from late 1974 until January 1975, that during the partnership period "Dixon" engaged in "very very little" lay off activity and that "Commander I" received what little they had [Tr. 129]; and finally, testimony of Daniel Kramer that during his service as a wireroom clerk from April 1975 through June 1975 he became aware of lay off wagers to "Commander I" only and that he did not know Joseph Falco by sight or name. [Tr. 278, 350]

THE GOVERNMENT'S USE OF THE FRUITS OF SUP-
PRESSED WIRETAPS IN ORDER TO IMPUGN FALCO'S
CHARACTER WITH PROOF OF OTHER CRIMES.

The voice of Falco in the three telephone conversations previously described, of course, had to

be identified on the government's direct case. Before trial, the government requested and Falco supplied a voice exemplar, and this proved satisfactory because it was the only means by which FBI agent Robert Walsh could and did identify Falco's voice. [Tr. 242] However, before Agent Walsh testified, the government through FBI agent Richard Nalley, operated differently. Beside the exemplar, Nalley during the course of this conspiracy had personally spoken with Falco for about an hour and a half in three conversations and these two factors - exemplar and personal conversations - were enough for him. [Tr. 199] Nonetheless, the government, resorting to suppressed wiretap information and in the guise of establishing a foundation for identity testimony smeared Falco unmercifully with evidence that he had been a target of a previous FBI investigation:

Q Have you ever overheard the defendant Falco's voice on the telephone?

A Yes, I have.

Q And on how many occasions have you heard his voice over the telephone?

A On approximately fifty occasions.

Q During what period of time, Sir?

A Between 1972 and 1973.

Q Approximately how long did those telephone conversations last?

A Two or three minutes.

[Tr. 199]

Counsel for Falco asked for a side bar and moved for a mistrial because these 50 overheard telephone conversations derived from wiretaps that had been suppressed in *United States v. Gigante*, 538 F2d 502 (2nd Cir. 1976), and because of the unwarranted character besmirchment of his client. [Tr. 201-203]

Judge Weinfeld classified Mr. Crupain's motion as "utterly absurd," and denied it. However, he granted counsel's alternative move to have the testimony stricken and did so in this way:

Court: Members of the jury, I'm going to strike a portion of the witness' testimony, that portion where he testified that he listened to the defendant's voice over some tape recordings which, incidentally, are other than the tapes which he testified to here.

He also testified that he had face-to-face conversations with the defendant, I believe, on three separate occasions totaling an hour and a half. On that basis I am admitting his testimony as far as these tapes are concerned just offered in evidence. We will strike the rest of the testimony.

Proceed.

[Tr. 204]

During jury deliberations, the matter accidentally revitalized after jury notes were received asking for an explanation of the law as it related to lay off bets and a reading of Agent Nalley's testimony. [Tr. 610] Though the picture is not entirely clear from the record, the court stenographer began reading Agent Nalley's struck testimony and was cut short by Judge Weinfeld. After the jury returned for deliberations, Mr. Crupain began to protest that untimely development and renewed his mistrial motion. Judge Weinfeld cut Mr. Crupain off, stating: "He read back one portion and I stopped him and said it was stricken from the record ..." [Tr. 613]

THE COURT'S REFERENCE TO CONGRESS'S PURPOSE
IN ENACTING § 1955.

In his charge, Judge Weinfeld placed before the jury the following:

"This act was passed by Congress in an effort to stamp out large-scale gambling operations which annually drain billions of dollars from the public, and was a major source of income to organized crime whose activities tend to subvert the democratic process and to corrupt public officials." [Tr. 561]

Counsel took exception to the charge. The Court answered:

"I always instruct the jury about the statute."

[Tr. 607]

ARGUMENT

POINT I

FALCO DID NOT VIOLATE THE FEDERAL GAMBLING STATUTE BECAUSE HE DID NOT "CONDUCT" "DIXON'S" BUSINESS.

Falco's participation in "Dixon's" bookmaking business was too "negligible" to put him on trial for conducting it. *United States v. Todaro*, No. 76-1355, slip op. 1967, 1969 (2nd Cir. Feb. 24, 1977); *United States v. Box*, 530 F2d 1258 (5th Cir. 1976); *United States v. Thomas*, 508 F2d 1200 (8th Cir. 1975). His involvement consisted entirely of accepting some "lay off" wagers for two days or so in "Dixon's" twelve months life span. The government virtually proved that "National's" contacts were this isolated. Thus, Robert Briendel testifying for the government under a grant of immunity points out that when he and Richard Esposito were partners in "Dixon" from late 1974 until January 1975, they made "very very little" lay off wagers and that "Commander I" received what little they had. Daniel Kramer also testifying under a grant of immunity never heard of "National" or Falco although he worked in the wireroom from April 1975 through June 1975. The telephone conversation between Richard Rizzo and Daniel Kramer of June 14, 1975 shows that "National" intended to stop taking "Dixon's" lay off bets because it was too

small to handle it. The actual termination of this relationship is then borne out from the government's failure to come up with anything more on "National" although the government maintained a wiretap of "Dixon's" wireroom from July 11, 1975 through July 29, 1975.

The government erected a major prosecution against Falco without proving that "National," the organization he really worked for operated as an illegal gambling business under 18 U.S.C. § 1955 (five or more persons with a \$2,000 gross on any one day or of 30 days or more duration). It took an outsider with no stake in the success of "Dixon," *United States v. Falcone*, 109 F2d 579, 581 (2nd Cir. 1940), and put him on trial without proof that he participated in the operation of "Dixon's" business.

Though this circuit has not specifically spoken with regard to the statute's coverage of lay off betting^{*}, a sensible course was assumed by Judge Weinfeld when he charged the jury that Falco would be covered by the act if he:

^{*}But compare the dictum in *United States v. Becker*, 461 F2d 230, 232 (2nd Cir. 1972), Cert. Denied, 420 U.S. 776 (1974) ("Thus Congress's intent was to include all those who participate in the operation of a gambling business regardless how minor their roles and whether or not they be labeled agents, runners, independent contractors or the like, and to exclude only customers of the business."), with the result in *United States v. Todaro, supra*, (No violation of § 1955 although the defendant, an outsider to the Castellanis operation "was one of the best line makers in the business.")

"... provided a regular and consistent market for lay off bets by the "Dixon" operation ... and that such lay offs were reasonably necessary to permit the "Dixon" operation to function as an illegal gambling operation ..."

[575]

Had Judge Weinfeld himself heeded the wisdom of his instruction, Falco's case would not have gone to the jury because Falco did not provide "Dixon" with a "regular" and "consistent" market for lay off bets.

POINT II

THE GOVERNMENT VIOLATED THE RULE AGAINST USE OF OTHER CRIMES TO SHOW A DEFENDANT'S CRIMINAL CHARACTER WHEN ON THE PRETEXT OF SHOWING AGENT NALLEY'S BASES FOR KNOWING FALCO'S VOICE IT PUT BEFORE THE JURY THE FBI'S TAINTED WIRETAP INVESTIGATION OF HIM.

It is perfectly obvious that on a pretext of showing Agent Nalley's bases for knowing Falco's voice the government sought to hurt Falco by telling the jury about the FBI's prior investigation of him. The government succeeded and this is impermissible under the rule that forbids evidence of prior crimes to show the disposition, propensity, or proclivity of an accused to commit the crime charged. Fed. R. Evid. 404; *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L. Ed. 168 (1948); *United States v. DeCicco*, 435 F2d 478 (2nd Cir. 1970); *United States v. Rinaldi*, 301 F2d 576 (2nd Cir. 1962).

The government made no pretense that Agent Nalley actually needed the voice of Falco he gleaned from this prior investigation. Not only did Nalley have Falco's exemplar but he also could predicate identity from personal conversation. What is doubly appalling about the course of action the government pursued is that what Nalley had heard came from tainted wiretap interceptions. Michael Abzug, the Assistant United States Attorney at the trial knew full well that Judge Thomas P. Griesa issued an order in *United States v. Gigante, et al.*, 75 Cr. 94, suppressing the fruits of the surveillance authorizations of that investigation and that this court affirmed him in *United States v. Gigante*, 538 F2d 502 (2nd Cir. 1976). If the prosecutor genuinely believed he still had relevant and admissible* evidence despite the foregoing considerations his proper course would have been to seek an advanced ruling in the absence of the jury that his evidence is admissible and that its probative value outweighs the danger of unfair prejudice. See Fed. R. Evid. 403.

The fact that Judge Weinfeld struck the testimony does not cure this kind of error. *United States v. Rinaldi*, 301 F2d at 578. Indeed the record

*Nalley obviously came by this information through exploitation of illegal government conduct. See, *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963).

will bare out that the prejudice was not removed because in the midst of jury deliberations and just before the verdict, the court reporter, in response to the jury's request to have Agent Nalley's testimony read, accidentally began reading the struck portion, reminding the jury of it again. Thus at a crucial juncture in the jury's weighing of Falco's innocence or guilt, the forbidden evidence of other crimes came out once more and no doubt helped generate the swift turning of the tide in the government's favor.

POINT III

IT WAS PLAIN ERROR FOR THE JUDGE
TO HAVE CHARGED THE JURY ON CON-
GRESS'S PURPOSE IN ENACTING § 1955.

The extended reference in the court's charge to Congress's purpose in enacting §1955 injected into the trial a highly prejudicial suggestion that the defendants were part of a wider organized crime syndicate that is ruining the country financially and shaking its constitutional foundation. If a prosecutor pressed such inflammatory claims before a jury he would be castigated. *United States v. Leon*, 534 F2d 667 (6th Cir. 1976). (Prosecutor's references in summation to Congress's purpose in enacting §1955 is cause for a reversal); *United States v. Love*, 534 F2d 87 (6th Cir. 1976) (In a prosecution under § 875 (c), transmitting in interstate

commerce a communication containing a threat to injure another person, a prosecutor's question of appellant on cross examination asking whether appellant's employer was connected with Mafia constituted plain error);

United States v. Schwartz, No. 76-1324 slip op. 1535 (2nd Cir. Jan. 25, 1977) (No ground for reversal is found because the prosecutor's question could not be regarded as containing an implicit claim that the defendant was associated with organized crime.) When such dramatizations come from a judge, venerated as he is by most jurors, rather than a partisan prosecutor, there is an even greater danger that the jury will misconstrue its role and convict to save the country.

In a case so close in regard to the sufficiency of the evidence against Falco, where most of the defendants including him bore Italian-sounding names - immediately signaling to the jury, or course, the possibility of their being "Mafia" - the judge's elaboration on Congress's purpose was particularly unsuitable and prejudicial to the occasion.

POINT IV

THREE SEPARATE CONSPIRACIES WERE PROVED, EACH BETWEEN "DIXON" AND EACH OF THE THREE BOOKMAKING OPERATIONS IT MADE LAY OFF BETS WITH. THE SPILL-OVER EFFECT DENIED FALCO A FAIR TRIAL.

Though "Mr. White," "Commander I," and "National" all accepted lay off bets from "Dixon," they had no dealings with each other. There is no evidence that "National" or Falco had anything to do with the others, or knew of their existence or had reason to. The government may argue that the book-making practice of laying off wagers is so common that "National" should have been aware, and thus joined the larger conspiracy, c.f., *United States v. Arroyo*, 494 F2d 1316 (2nd Cir. 1974), Cert. Denied, 419 U.S. 827 (1974). This argument would be somewhat disingenuous of the government in light of Robert Briendel's testimony that during the four months he and Esposito operated "Dixon," they engaged in "very very little" lay off betting.

The prejudice Falco sustained from the variance in proof comes from the spill-over effect of otherwise inadmissible testimony which most assuredly increased the likelihood of Falco's conviction in a close case of innocence or guilt. *United States v. Bertolotti*, 529 F2d 149 (2nd Cir. 1975). Specifically, at a separate trial Falco would be spared, Daniel Kramer's long and engrossing story of how a nice boy from the Yeshiva University High School in the Bronx came to be corrupted by organized crime and evolved from runner to clerk and finally into his entrepreneurship of "Dixon's" lay off action to "Mr. White."

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE
REVERSED AND THE INDICTMENT DISMISSED
AS AGAINST FALCO. ALTERNATIVELY FALCO
SHOULD BE GRANTED A NEW TRIAL.

Respectfully submitted,

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May 13, 1977.

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